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Supreme Court

of the

United States

SPRING TERM, 1973

NO. 73-271

RAUL JESUS ALVAREZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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Supreme Court
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SPRING TERM, 1973

NO. _____

RAUL JESUS ALVAREZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on April 9, 1973.

CITATIONS TO OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is printed in Appendix A hereto and is reported at 476 F.2d 280 (5th Cir. April 9, 1973)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 9, 1973. Rehearing was denied on May 17, 1973. The jurisdiction of this Court is invoked under Title 28. United States Code, Section 1254 (1). This Petition is not timely.[1]

QUESTIONS PRESENTED

1. Whether there is sufficient evidence in this record to connect the Defendant with eleven (11) pounds of heroin and six (6) pounds of cocaine and thus justify its introduction against him when weighed against the devastatingly prejudicial impact of such evidence when placed before a petit jury.

2. Whether there is sufficient evidence to convict the Defendant of a conspiracy to possess and distribute narcotics where there is no evidence that he accomplished or furthered any of the aims of the conspiracy.

3. Whether in light of the "hardly conclusive" evidence of Defendant's guilt, the trial court committed fundamental error in permitting its law clerk to read instructions to the jury.

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[1]Counsel for Petitioner misconceived the due date of this Petition. Counsel moved for an extension of time in which to file this Petition for Certiorari, but due to his error in computing time the motion was returned by the Clerk. The untimeliness of this Petition is through no fault of the Petitioner himself.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the due process clause of the Fifth Amendment to the United States Constitution, U.S.C.A. Const. Amend. V.

STATEMENT OF THE CASE

After a jury trial, Defendant was convicted of one count of conspiracy to possess with intent to distribute and to distribute narcotic drugs in violation of 21 United States Code §846. Defendant was sentenced to five (5) years imprisonment pursuant to 18 United States Code § 4208 (a) (2) to be following by three (3) years probation.

FACTS

In light of the fact that the Government presented no testimony upon which the conviction could be based, the Defendant rested his case immediately after the trial court denied his motion for directed verdict at the close of the Government's case.

The Government's case consisted entirely of the testimony of three witnesses, a confidential informer and two Government agents, and two boxes containing eleven pounds of heroin and six pounds of cocaine. Only one of the Government witnesses, Manuel Rodriguez (the confidential informer) had any dealings whatsoever with the Defendant. The two agents merely observed Rodriguez' three encounters with the Defendant from a distance.

Rodriguez told of meeting with the Defendant three times. The first meeting took place on December 14, 1971 at a Royal Castle hamburger stand in Miami. Rodriguez' testimony was given through an interpreter and the de-

scription of the Royal Castle meeting is so vague and confusing that it must be set out verbatim:

Q. Would you please state to us the circumstances surrounding this meeting?

A. December 14 around one o'clock I arrived in one car with Rene Vandenadez. Rene look for Chu Chu (the Defendant) and in one car and both pull the car into the Hamburger Castle place on 67th and 8th Street.

Q. Is that a Royal Castle, sir?

A. Hamburger place, Royal Castle, hamburger. Royal Castle there, the name over there. So, Rene said to Chu Chu — that is the only name I know him — to Chu Chu where are you? I looking for two or three days and Chu Chu say, "You see the bald man?" I don't know who is the bald man. I don't see nobody.

Q. When you speak of "him" to whom are you referring?

A. Rene asked Chu Chu is he had seen the bald man. Chu Chu said that he hadn't seen anybody.

. . .

Chu Chu told Rene that he had not seen anybody because he was hot and that he had nothing at the garage because Calito (phonetic) was at the beach. They didn't want to go to the garage because Rene was very hot and to go at five o'clock to the beach. To the beach is the place he knew.

. . .

Q. Who was going to the beach?
A. Rene.

Q. Who told Rene to go to the beach?
A. Chu Chu.

. . .

> Rene answered that he was going to the beach for sure and then one person that was in the car with Chu Chu who was waiting there, got out of the car. It is better for you to terminate that conversation because the brown car has been by two or three times and you are going to have some problems. Chu Chu said to them be at the beach for sure at five o'clock and Rene said okay. Rene speeded his car. He gave me $5.00 to go to a movie and he ordered me to come back to the Pueblo Supermarket at seven p.m.

Thus ended the first direct encounter between Rodriguez and the Defendant. The second meeting took place that evening at the Pueblo Supermarket. Once again Rodriguez testified that the Defendant told him "that his connections were very scared because Rene was very hot and he could lose everything.[2] The only other thing Defendant did at this meeting was talk with Rene Vandena-

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[2]Later in his testimony the Government Attorney brought Rodriguez back to this conversation. This time Rodriguez testified:

> A. On a specific day he told me the connection was very careful of Rene and didn't want to give Rene anything; that these people didn't want to lose four or five kilos because it was a lot of money. I was angry and I wanted to return to Chicago right away.

dez out of Rodriguez' hearing. The only other thing the Defendant said at this meeting was that Rodriguez should rent a car and wait for the Defendant to pick him up in the morning to go to Chicago.

Rodriguez waited at the Orange Motel until two o'clock the next day. The Defendant did not show up. Rodriguez then left the Motel and proceeded to the gas station owned by Rene Vandenadez. Rene told Rodriguez that he would try to reach the Defendant and that Rodriguez was to wait at the Pueblo Supermarket at seven p.m.

At seven p.m. that night Rodriguez met with the Defendant for the last time. Once again the Defendant told him that he was unable to get "something" from the connection "because he was very afraid that Rene was very hot on account of his kidnapping; and that they were not going to lose."

According to Rodriguez, the Defendant then told him to wait for Rene and tell him to meet the Defendant at nine o'clock the next morning "to see the connection, both of them together, and to try to convince him to give him the thing." Rodriguez conveyed the message.

However, the Defendant never showed up "to see the connection." Instead, it was Rene Vandenadez and his wife who, according to Rodriguez, had seen the connection.

From this point on, the Defendant took no part whatsoever in the events described by Rodriguez and the two Government agents. Counsel for the Defendant objected to the admission of any further conversations between Rodriguez and co-conspirators or between co-conspirators out of the presence of the accused.

Rodriguez then told of another meeting at the Pueblo Supermarket on December 16 to which no one came.

The next day Rodriguez and special agent Saul Weinstein of BNDD left Miami for Chicago.

Between December 17, 1971 and January 5 or 6, 1972 nothing happened.

On January 5 or 6, 1972, Rodriguez, together with agents Weinstein and Schular of BNDD returned to Miami after Rodriguez had received a telephone message from Rene Vandenadez.

Immediately upon his arrival in Miami, Rodriguez proceeded to Rene Vandenadez' garage. From this point on, he was under constant surveillance by agents Weinstein and Schular. Apparently, Rodriguez' arrival was too late to meet a man from New York who Rene had intended that he meet. Rodriguez asked Rene "what do I have to do with New York?", to which Rene responded "I changed my plans" and proceeded to describe new plans which involved, according to Rodriguez, the delivery of one package in New York and one package in Chicago.

Once again, counsel for the Defendant objected on the grounds that absolutely no connection was shown between the Defendant and the two deliveries in New York and Chicago. The Court ruled that the conversations were admissable to show "course of conduct", but subsequently limited the admission of the conversations subject to "direct connection with the Defendant." When counsel for the Government continued to inquire of Rodriguez regarding the New York plans, the Court overruled Defendant's repeated objection.

Rodriguez then testified that he and Rene talked about having a "contact" and that Rene told him that as soon as he contacted "the person" he would set up a meeting at the Pueblo Supermarket.

The only mention of the Defendant came when the Government asked Rodriguez "Did [Rene] tell you anything else that evening?", to which Rodriguez answered "That he had to locate Chu Chu" and that Chu Chu would take care of him in Chicago.

On January 6, 1972, Rodriguez, Rene Vandenadez and Marta Rodriguez picked up two boxes at a Texaco Station one of which was placed in Rodriguez' car and the other in an Oldsmobile belonging to Rene Vandenadez. Thereafter, one of the boxes was turned over by Rodriguez to the Agents and the other was picked up by the Agents pursuant to a search warrant.

On cross examination Rodriguez testified that to his knowledge the Defendant never talked to him or anyone else about the subject of narcotics; that he never asked the Defendant to supply him with narcotics and that the words narcotics, heroin or cocaine were never used by the Defendant.

The only words used by the Defendant which were interpretable as narcotics related were "connection" and "kilos", about which words it was readily admitted that they have substantial non-narcotics meanings. Rodriguez admitted that he was never told who the "connection" was or the purpose of the "connection".

Rodriguez further admitted on cross examination that the New York transaction was a different transaction

than the one about which he had discussions with Defendant. Moreover, Rodriguez described how Rene Vandenadez told him to meet the Defendant in Chicago in December but that the Defendant never showed up.

The testimony of Agents Weinstein and Schular added very little to the Rodriguez story except to corroborate via surveillance at a distance that the meetings described by Rodriguez did take place and that the packages were acquired as described on January 6, 1972. Defendant's fingerprints were not found on the packages.

At the beginning of the trial, counsel entered into a stipulation that Government's exhibits 1A and 1B were the two boxes taken from Manuel Rodriguez and Rene Vandenadez. Counsel for the Defendant did not, however, stipulate either to the contents of the boxes or to their admission into evidence.

At the end of the Government's case, counsel agreed to and did stipulate that the boxes contained eleven (11) pounds of heroin and six (6) pounds of cocaine but continued to object to the introduction thereof which objection was cut short and overruled.

At the conclusion of all the evidence, the trial judge permitted his law clerk to read the instructions to the jury.

The Petitioner appealed the jury verdict and judgment of guilt presenting to the Court of Appeals the questions now presented here. The Fifth Circuit affirmed the lower court *per curiam* notwithstanding its observation that "the Government's case against Alvarez was hardly conclusive".

REASONS FOR GRANTING THE WRIT

I

THIS CASE PRESENTS AN IMPORTANT QUESTION IN THE ADMINISTRATION OF CRIMINAL JUSTICE AS TO WHAT DEGREE A CONNECTION MUST BE SHOWN BETWEEN A DEFENDANT AND THE SPECIFIC HEROIN AND COCAINE OFFERED AS PROOF AGAINST HIM.

The decision of the Court of Appeals does not deal directly with Petitioner's point that admission of the heroin and cocaine was error but its affirmance of Petitioner's conviction constitutes a negation of the point and is therefore in conflict with the reasoning of the Ninth Circuit in *Evans v. United States*, 257 F.2d 121 (9th Cir.), *cert. denied* 358 U.S. 866 (1958). *Evans*, did not turn on error in the admission of physical evidence. However, the principles enunciated in *Evans* directly control the question of whether a connection need be shown between defendant and specific heroin upon which the Government bases its case. William and Josephine Evans were tried on two counts of unlawfully concealing, transporting and selling heroin, one count of unlawfully concealing and transporting marijuana and one count of conspiracy to commit the offenses with regard to the heroin. The Government's uncontroverted evidence failed to show any connection between Williams and the specific heroin referred to in the substantive counts. This connection lacking, William's conspiracy conviction was reversed.

Likewise, the Government's uncontroverted evidence in the present case failed to show any connection between the Petitioner and the eleven (11) pounds of heroin and six (6) pounds of cocaine placed before the jury. In dealing only with Petitioner's "sufficiency" argument, the Court of Appeals observed,

> Finally, even considering Vandenades' change of plans with regard to the destination of the narcotics, we are not prepared to say that the jury could not "*reasonably conclude*" that Alvarez's negotiations with the connection enabled Vandenades to ultimately obtain the narcotics. (Memorandum opinion at 3) (Emphasis supplied)

It was not for the jury to decide whether a connection had been shown. The admission of physical evidence is a matter within the discretion of the Court in the first instance and it has been recognized such evidence can have a substantial impact on a jury and should be admitted only where completely necessary and relevant. *Cf, Landsdown v. United States*, 348 F.2d 405 (5th Cir. 1965)

Basically, therefore, this case presents an important question in the administration of criminal justice and one which was not expressly dealt with by the Court of Appeals. There are few cases dealing directly with the precise question of connection between defendant and physical narcotics exhibit. In *United States v. Conrad*, 448 F.2d 271 (9th Cir. 1971) and *United States v. Alloco*, 234 F.2d 955 (2d Cir.) *cert. denied*, 352 U.S. 931 (1956) the question was left open because the "connection" was apparent. In *Roviaro v. United States*, 379 F.2d 911 (7th Cir. 1967) strong independent evidence of defendant's guilt overcame the prejudice inhering in the admission of unconnected heroin.

In the instant case, even the Court of Appeals found that "the Government's case against Alvarez was hardly conclusive . . . " and found resort to principals of appellate construction in affirming the jury verdict. This case presents, therefore, an important question as to the degree to which it must be shown that the heroin and cocaine were a product of the conspiracy in which defendant participated before it is placed before a petit jury.

II

THE CONSPIRACY PROSECUTION HAS BECOME A CATCH-ALL LAW ENFORCEMENT TOOL. THE COURT OF APPEALS' AFFIRMANCE OF PETITIONER'S CONVICTION EXTENDS THE ALREADY NET-LIKE SCOPE OF THIS TOOL BY EFFECTIVELY BRINGING WITHIN THE MEANING OF CONSPIRACY THE DEFENDANT WHO DOES NOTHING TO FURTHER ITS AIMS BUT, FOR REASONS OF HIS OWN, IS UNWILLING TO OPENLY REPUDIATE IT. THIS CASE, THEREFORE, PRESENTS A CRUCIAL QUESTION AS TO THE SCOPE OF CONSPIRACY AND THE DEGREE TO WHICH THE JURY WILL BE ALLOWED TO CHOOSE BETWEEN CONFLICTING INFERENCES.

Without belaboring the details set forth in the "Statement of the Case," *infra.*, it is undisputed that the Government's case against Petitioner, in order to succeed, required the jury to reason as follows:

> Although the government failed to show that the defendant accomplished anything for the conspiracy, although the government's own witnesses related how the defendant failed to show up on several occasions to perform acts which would have been in furtherance of the conspiracy; although the eleven (11) pounds of heroin and six (6) pounds of cocaine were acquired by persons other than the defendant, more than three (3) weeks after the last time any of the government's witnesses stated he was even involved and after the disposition plans had been changed apparently without defendant's knowledge, we can conclude that defendant was part of the conspiracy because he himself had told the co-conspirators that he was unable to make the "connection" and, from this we can infer that he tried.

Unmistakably, this case will have a significant impact on the administration of criminal justice by permitting the Government to secure conspiracy convictions on the bare testimony of paid informers who are themselves unable to show any conclusive accomplishment of Defendant in furtherance of the conspiracy. Nevertheless, the jury is permitted to choose its inference and the Defendant goes off to jail not because there is proof that he conspired but because he has failed to prove that he did not. As it stands this case is in conflict with *Ingram v. United States*, 360 U.S. 672 (1959); *Panci v. United States*, 256 F.2d 308 (5th Cir., 1958); *Evans v. United States*, 257 F.2d 121 (4th Cir. 1958); *Ong Way Jong v. United States*, 245 F.2d 392 (9th Cir. 1957) and with *Krolewitch v. United States*, 366 U.S. 140 (1949) (Mr. Justice Jackson concurring)

III

THIS CASE PRESENTS AN IMPORTANT ISSUE OF FIRST IMPRESSION AS TO THE PROPRIETY OF THE TRIAL JUDGE PERMITTING HIS LAW CLERK TO DELIVER THE INSTRUCTIONS TO THE JURY IN A CLOSE CASE OR OTHERWISE.

Rule 30, Federal Rules of Criminal Procedure provides that "the court shall instruct the jury . . . " The interests of justice are best served when the trial judge makes a diligent effort to apply Rule 30 both in letter and in spirit. *Walker v. United States*, 418 F.2d 1116, 1119. (D.C. Cir. 1969). "Great care must be used in instructing a jury in crimes involving serious penalties to insure that those who acted mistakenly or inadvertently or for other innocent reasons are properly protected." *United States v. Brown*, 453 F.2d 101, 108 n. 8, (8th Cir. 1971) *cert. denied* __U.S.__, 92 S.Ct. 1205 (1972). Where the issues are close the trial judge has an obligation to instruct the jury with extreme precision and the appellate court has a duty to review the charge with what, in a less doubtful case, would be an undue meticulousness. *Cooper v. United States*, 357 F.2d 274, 276 (D.C. Cir. 1965).

Judge Choate permitted his law clerk to read the jury instructions. Clearly, the respect which is due to the Judge as the guiding principal of the law does not inure to the Judge's clerk merely because the Judge informs the jury that the Clerk will read the instructions because he cannot.

The Trial Court committed reversible error by permitting its law clerk to deliver the jury charge.

CONCLUSION

Based on the foregoing reason and authority, Petitioner prays this Honorable Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

BIERMAN & SONNETT P.A.
Attorneys for Petitioner
28 West Flagler Street
Miami, Florida 33130

BY /s/ Donald I. Bierman
DONALD I. BIERMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed this 31st day of July, 1973 to United States Attorney, 300 Ainsley Building, Miami, Florida 33132 and to the Solicitor General in Washington, D.C.

/s/ Donald I. Bierman

DONALD I. BIERMAN

APPENDIX

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 72-1909

Summary Calendar.*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARTA RODRIGUEZ and RAUL JESUS ALVEREZ,
Defendants-Appellants.

April 9, 1973.

Rehearings Denied May 17, 1973.

By judgments of the United States District Court for the Southern District of Florida, at Miami, Emett C. Choate, J., one defendant was convicted of the crime of distribution of heroin and cocaine and of possession of these narcotics with intent to distribute them and for conspiracy while the other defendant was convicted of conspiracy to possess and distribute the narcotics, and they appealed. The Court of Appeals held that although Government's case against defendant was hardly conclusive, record clearly demonstrating that defendant was negotiating with connection for narcotics and enlisted aid of

*Rule 18, 5th Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th Cir. 1970, 431 F.2d 409, Part I.

others when connection appeared ready tc abandon deal was sufficient to sustain conviction for conspiracy to possess and distribute narcotics.

Affirmed.

Conspiracy Key 47(12)

Although Government's case against defendant was hardly conclusive, record clearly demonstrating that defendant was negotiating with connection for narcotics and enlisted aid of others when connection appeared ready to abandon deal was sufficient to sustain conviction for conspiracy to possess and distribute narcotics.

Lewis Williams, Eugene J. Howard, Miami, Fla., for Rodriguez.

Donald I. Bierman, Miami, Fla., for Alverez.

Robert W. Rust, U. S. Atty., Barbara E. Vicevich, Asst. U. S. Atty., Miami, Fla., for United States.

Before THORNBERRY, GOLDBERG and RONEY, Circuit Judges.

PER CURIAM:

Appellant Marta Rodriguez was convicted by a jury of distribution of heroin and cocaine, of possession of those narcotics with intent to distribute them, and of conspiracy to commit the foregoing offenses. Appellant Raul Alverez was convicted after a separate jury trial of conspiracy to possess and distribute the narcotics.

Alverez contends that the evidence was insufficient to support his conviction. The record shows that Alverez was to obtain narcotics, destined for Chicago, from an anonymous "connection," and was to give the narcotics to an alleged co-conspirator, Rene Vandenades, in Miami, Florida. The Government, through the testimony of a paid informant, proved that Alverez met Vandenades and/or the informant in Miami on three occasions. At the first meeting, Alverez said that his "connection" was reluctant to deal with Vandenades because Vandenades was "hot"; but he told Vandenades to go to the beach that afternoon. The first meeting was abruptly terminated when a companion of Alverez told the group that he suspected that they were under surveillance. Later that day, Alverez met the informant for a second time. Alverez again said that the connection was afraid that Vandenades' involvement might result in the loss of "four or five kilos," worth a considerable sum, but told the informant to rent a car and be prepared to leave for Chicago the following morning. Alverez did not appear at the appointed time the next morning, but during his third meeting with the informant that night he explained that he had been unable to appear because he was trying (unsuccessfully) to get "something" from the connection. At this third meeting, Alverez asked Vandenades to accompany him the next day to negotiate with the connection.

This was the sum of the Government's direct evidence against Alverez. The remainder of the testimony showed that Vandenades abandoned the scheme of sending narcotics to Chicago and decided to send them instead to New York. The informant, accompanied by Marta Rodriguez, drove Vandenades to a service station where he took the narcotics from the trunk of his car; the informant and

Rodriguez then drove around Miami while Vandenades made up smaller packages of narcotics in the back seat of the informant's car.

The Government's case against Alverez was hardly conclusive, but viewing the evidence in the light most favorable to the Government we believe there was sufficient evidence upon which the jury could base a finding of guilt beyond a reasonable doubt. In none of Alverez's meetings with Vandenades or the informant were the words "narcotics," "heroin," or "cocaine" used; but a special agent of the Bureau of Narcotics and Dangerous Drugs testified that when Alverez said "kilos" he was using the common reference to a quantity of narcotics. Moreover, we cannot accept the contention that Alverez did nothing in furtherance of the conspiracy, because the record clearly demonstrates that Alverez was negotiating with the connection for the narcotics, and enlisted Vandenades' aid when the connection appeared ready to abandon the deal. Finally, even considering Vandenades' change of plans with regard to the destination of the narcotics, we are not prepared to say that the jury could not reasonably conclude that Alverez's negotiations with the connection enabled Vandenades to ultimately obtain the narcotics. Therefore, we reject Alverez's claim that there was insufficient evidence to warrant his conviction.

We have considered the other contentions of both appellants, and find them to be without merit.

Affirmed.

APPENDIX "B"

AMENDMENT V

CAPITAL CRIMES; DOUBLE JEOPARDY, SELF-INCRIMINATION; DUE PROCESS: JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SUPREME COURT, U. S.
No. 73-271
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

RAUL JESUS ALVAREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-271

RAUL JESUS ALVAREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the sufficiency of the evidence, the admissibility of certain physical evidence, and the court's procedure in permitting a law clerk to read the court's instructions to the jury.

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to possess and distribute heroin and cocaine in violation of 21 U.S.C. 841(a) and 846. He was sentenced to five years' imprisonment with immediate eligibility for parole under 18 U.S.C. 4208(a)(2). The court of appeals affirmed, and a petition for rehearing was denied on May 17, 1973 (Pet. App.). The petition for a writ of certiorari was not filed until August 1, 1973, and is therefore substantially out of time under Rule 22(2) of this Court's Rules. In any event, there is no occasion for further review.

The evidence showed that a government informer, Manuel Rodriguez, met with Rene Vandenades in November 1971. The latter offered Rodriguez $2,000 to deliver a package to petitioner in Chicago (Tr. 33).[1] On December 14, following a conversation with Vandenades's wife, Manuel Rodriguez went to Florida, accompanied by an agent of the Bureau of Narcotics and Dangerous Drugs (Tr. 34). Rodriguez met Vandenades, and they joined petitioner at a restaurant (Tr. 25). Petitioner told Vandenades to meet him later at the beach, rather than at Vandenades's garage, since Vandenades was "very hot." Rodriguez and Vandenades planned to meet at a supermarket afterward (Tr. 26-27).

Rodriguez met petitioner at the supermarket that evening, and petitioner said that Vandenades was very "hot," that the "connection" was frightened, and that the connection was reluctant to give anything to Vandenades (Tr. 27, 45, 50). Rodriguez complained that he had come to Miami to get a package or money, and that he was eager to return to Chicago (Tr. 46, 50). Petitioner replied, "Don't blame these people because they don't want to lose four or five kilos. It is a lot of money" (Tr. 50-51). After Vandenades arrived, petitioner instructed Rodriguez to rent an automobile and meet him early the following morning, so that they could travel together to Chicago (Tr. 28).

Petitioner failed to keep the appointment, and Rodriguez went to see Vandenades. The latter said he would try to make contact with petitioner, and directed Rodriguez to be at the supermarket again that evening. Rodriguez kept the appointment and met petitioner,

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[1] "Tr." refers to the trial transcript, included in the Appendix filed in the court of appeals. It is paginated in the copy as (T-33), etc. We are lodging a copy with the Clerk of this Court.

who explained that he had failed to meet Rodriguez earlier because the connection was still afraid, and that petitioner had been unable to obtain anything from him (Tr. 29). Petitioner told Rodriguez to have Vandenades contact petitioner, so that together they might see the connection and persuade him to give them the "thing" (Tr. 30).

On the following day, Rodriguez saw Vandenades and said he would wait no longer and was returning to Chicago (Tr. 32). Three weeks later, after a telephone call from Vandenades, Rodriguez returned to Miami with two federal agents and met Vandenades at the garage (Tr. 35). Vandenades told Rodriguez of a change in plans: Rodriguez was to deliver one package to New York, return to Miami for a second package, and deliver it to Chicago (Tr. 36). Vandenades said that he would locate petitioner, and that Rodriguez should wait for the connection and the "merchandise." As soon as he got the "merchandise," Rodriguez could go to Chicago, and petitioner would take care of him (Tr. 39-40).

The following morning, Rodriguez, Vandenades, and Marta Rodriguez (Vandenades's wife) met and drove to a gasoline station and parked next to an Oldsmobile. Vandenades removed two packages from the Oldsmobile and returned to the other car, telling Rodriguez to drive around while he wrapped the packages. They returned to the service station, and Marta Rodriguez returned one package to the Oldsmobile (Tr. 41-44). The packages were subsequently seized by BNDD agents and found to contain eleven pounds of heroin and six pounds of cocaine. They were admitted in evidence over objection (Tr. 44, 61-62, 93-94).

1. Petitioner contends that the government's evidence was insufficient to connect petitioner with the conspiracy

alleged in the indictment. Petitioner does not deny that the government proved the existence of a conspiracy, although he challenges the sufficiency of the evidence to prove his participation in the scheme. It is settled, however, that once the conspiracy is shown, only slight evidence is required to link a particular defendant to the plan. *United States* v. *Pardo-Bolland,* 348 F. 2d 316, 325 (C.A. 2), certiorari denied, 382 U.S. 944; *United States* v. *Kenny,* 462 F. 2d 1205, 1226 (C.A. 3), certiorari denied *sub nom. Kunz* v. *United States,* 409 U.S. 914; *United States* v. *Iacovetti,* 466 F. 2d 1147, 1154 (C.A. 5), certiorari denied, 410 U.S. 908; *United States* v. *Hoffa,* 349 F. 2d 20, 46 (C.A. 6), affirmed, 385 U.S. 293; *United States* v. *Henderson,* 446 F. 2d 960, 965 (C.A. 8), certiorari denied, 404 U.S. 991; *Diaz-Rosendo* v. *United States,* 357 F. 2d 124, 130 (C.A. 9), certiorari denied, 385 U.S. 856. The evidence in the instant case was ample to establish that petitioner was intimately involved in the scheme to obtain and distribute illegal drugs.

With the government informant and another conspirator, petitioner attended several meetings, which were alleged as overt acts in furtherance of the conspiracy (Tr. 25, 27, 29).[2] When the informant expressed disgust with the delay in securing a "package," petitioner dissuaded him from returning to Chicago immediately (Tr. 46, 50-51). Petitioner instructed the informant to rent a car so that they could travel to Chicago together (Tr. 28). When petitioner failed to keep his appointment to begin the trip, he explained that it was because his "connection" was afraid and refused to give him the "thing" (Tr. 29-30). Petitioner's conversation contained repeated references to "kilos" and to a "connection" who was reluctant to supply him with anything because Vandenades was "hot." Viewed most favorably to the government, this evidence

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[2] Petitioner admitted being present at these meetings (Tr. 58-59).

supports the jury's verdict that petitioner participated in a conspiracy to acquire and distribute narcotics. *Glasser* v. *United States,* 315 U.S. 60, 80.[3]

2. Petitioner also contends that the narcotics which were seized from conspirators Vandenades and Marta Rodriguez were improperly admitted into evidence, since, in petitioner's view, the government failed to establish petitioner's responsibility for possession of the drugs. It is not necessary, however, to prove that all of the co-conspirators participated in each overt act. One who commits any overt act with knowledge of the conspiracy is liable for the acts of his coconspirators, even if he is absent when a substantive crime is committed. *Poliafico* v. *United States,* 237 F. 2d 97, 103-104 (C.A. 6), certiorari denied, 352 U.S. 1025.[4] This is true even if the accused is unaware of a specific transaction, as long as the act is within the scope of the original plan. To avoid liability for a subsequent act of his co-conspirators, the accused must show affirmatively his withdrawal from the scheme. *United States* v. *Cirillo,* 468 F. 2d 1233, 1239-1240 (C.A. 2), certiorari denied, 410 U.S. 989. In the instant case, petitioner concedes that he did nothing to repudiate the plan (Pet. 12).

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[3] The cases with which petitioner contends the present case conflicts (Pet. 13), stand merely for the point that one may not be convicted of conspiracy solely upon evidence of association with conspirators. The evidence in the instant case, however, shows petitioner's personal participation in the scheme, and the jury was instructed that conviction must not be based on mere association (Tr. 134).

[4] Petitioner errs in reliance (Pet. 10) upon *Evans* v. *United States,* 257 F. 2d 121 (C.A. 9), certiorari denied, 358 U.S. 866. There, the government failed to prove any conspiracy. Consequently, the complaining defendant could not be bound by the act of an alleged coconspirator.

As petitioner notes (Pet. 11), the admission of physical evidence is within the discretion of the trial court. The scope of this discretion, moreover, is particularly broad in a conspiracy case. *United States* v. *Skillman*, 442 F. 2d 542, 551-552 (C.A. 8), certiorari denied, 404 U.S. 833. The discretion is not abused by admission of relevant evidence relating to a coconspirator. "Thus, the acts of others not involving the defendant directly may come in against him merely to show the existence of a conspiracy, with which he is to be linked by quite separate proof." *United States* v. *Costello*, 352 F. 2d 848, 854 (C.A. 2), reversed on other grounds *sub nom. Marchetti* v. *United States*, 390 U.S. 39.[5]

3. Petitioner contends that the trial court committed reversible error in permitting the instructions to be read to the jury by a law clerk. While we do not question that the better practice is for the judge to deliver the charge himself, in the circumstances of the instant case, the procedure followed was not error, much less reversible error.

Following arguments of counsel, the court advised the jury, "it is my duty to instruct you as to the law that you are to apply to the evidence in arriving at your decision. You may have noticed that the Judge is getting a little old and his eyes are not as bright as they used to be; so I am going to have my Clerk read the instructions which we have prepared which, of course, is the law in this case" (Tr. 126-127). The court then directed the clerk to read the instructions, and after this was done,

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[5] In any event, the boxes containing the physical evidence were shown only briefly to the jurors, who were later advised of a stipulation that the boxes contained eleven pounds of heroin and six pounds of cocaine (Tr. 21-23, 93-94). In these circumstances, the presentation of the evidence was neither inflammatory nor prejudicial.

stated, "Now, you have heard the instructions read and I assume there are no differences." No objections were made. The record does not indicate that the judge was absent from the bench during any part of the delivery of the charge; the contrary would appear to be the case (Tr. 127, 142).

Under Rule 30 of the Federal Rules of Criminal Procedure, petitioner waived his right to object to the instructions by failing to do so before the jury retired to deliberate. Cf. *United States* v. *Kurfess*, 426 F. 2d 1017, 1020 (C.A. 7), certiorari denied, 400 U.S. 830; *United States* v. *Mancuso*, 423 F. 2d 23, 29 (C.A. 5), certiorari denied, 400 U.S. 839. See also *Lopez* v. *United States*, 373 U.S. 427, 436.

In any event, petitioner neither alleges nor shows any prejudice resulting from the procedure followed by the court in the instant case. It is not contended that the instructions themselves were prejudicial or erroneous or that they failed to state the applicable law, or that the jury failed to follow them. Petitioner's only argument in support of his position is that "the respect which is due to the Judge * * * does not inure to the Judge's clerk" (Pet. 14). Here, however, the judge made it clear that it was his duty to instruct the panel, that the instructions read by the clerk comprised the charge of the court and the applicable law, and that only physical infirmity prevented him from delivering the charge personally. In these circumstances, there is no reason to believe that the jury did not accord the proper respect to the instructions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.